



# Update on Protection Against Disability Harassment and Sex Harassment in the Federal Sector

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EXCEL Conference 2012  
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# Employment by the Federal Government

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## **42 U.S.C. § 2000e-16(a).**

- All personnel actions affecting employees or applicants for employment . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.
- The same guarantee of non-discrimination is set forth in two separate statutes for disability and age. The EEOC is given the same authority to enforce those laws as it was given in Title VII.



# Employment by the Federal Government

## Cont.

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### U.S.C. § 2000e-16(b)

- The EEOC shall have authority to enforce the provisions of subsection (a) **through appropriate remedies, including reinstatement or hiring of employees with or without back pay**, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. . . .
- The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment **shall be notified of any final action** taken on any complaint of discrimination filed by him thereunder.



# Employment by the Federal Government

## Cont.

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### **42 U.S.C. § 2000e-16(c)**

- Within 90 days of receiving notice of the agency's final action, the employee or applicant can go to federal court.
- The employee or applicant can go through the system of the AJ hearing and appeal to the EEOC (created through the agency's 29 C.F.R. 1614 regulations), and at the end of that process, if the person does not like the Commission's result, the person can go to federal court.
- If the employee or applicant has filed a complaint with the agency and nothing has happened for 6 months, or has filed an appeal with the Commission and nothing has happened for 6 months – the person can go to court.



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# UPDATE ON SEX DISCRIMINATION

Processing Complaints of Discrimination by  
Lesbian, Gay, Bisexual, and Transgender  
Federal Employees



# Macy v. Dep't of Justice - Background

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- Complainant, Mia Macy, filed a complaint under the 1614 process alleging that DOJ violated Title VII by discriminating against her on the basis of gender identity and transgender status.
- DOJ responded by stating that “claims of discrimination on the basis of gender identity stereotyping cannot be adjudicated [under the 1614 process]” and therefore it would consider Mia Macy’s claim only under the agency’s separate sexual orientation and gender identity discrimination policy and process.
- Mia Macy appealed that decision to the Commission



# Macy v. Dep't of Justice - Ruling

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- **In a decision issued by the full Commission, the EEOC held that:**

“[C]laims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII’s sex discrimination prohibition, and may therefore be processed under Part 1614 of EEOC’s federal sector EEO complaints process.”

*Macy v. Dep’t of Justice*, EEOC DOC 0120120821 (April 20, 2012), 2012 WL 1435995, p. 5 (E.E.O.C.).



# Title VII Claims by Transgender Employees

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- **The decision in Macy means that:**

Complaints of discrimination on the basis of transgender status should be processed under Title VII of the Civil Rights Act of 1964 and through the federal sector EEO complaint process at 29 C.F.R. Part 1614 as claims of sex discrimination.





# The Macy Decision Theory

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- Discrimination on the basis of transgender status is inherently based on a gender stereotype – the stereotype that you should always present according to the gender that had been assigned to you at birth.
- This gender stereotyping is a form of taking gender into account which is not valid under Title VII.



# Title VII Claims by Lesbian, Gay, and Bisexual Federal Employees

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- Lesbian, gay and bisexual individuals may also experience sex discrimination under Title VII, including sexual harassment or other kinds of sex discrimination.
- Sex discrimination under Title VII includes adverse actions taken because of a person's failure to conform to sex-stereotypes.



# Title VII Claims by Lesbian, Gay, and Bisexual Federal Employees Cont.

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- ***Rosa v. Department of Veterans Affairs***, EEOC Appeal No. 0120091318 (August 3, 2009); 2009 WL 2513955 (E.E.O.C.) (harassment against a male employee including repeated innuendos about his sexuality and verbal mocking using “very feminine voices” can constitute discrimination based on sex)
- ***Veretto v. U.S. Postal Service***, EEOC Appeal No. 0120110873 (July 1, 2011); 2011 WL 2663401 (E.E.O.C.) (discrimination based on sex-stereotype that men should only marry women can constitute discrimination based on sex)
- ***Castello v. U.S. Postal Service***, EEOC Request No. 0520110649 (December 20, 2011); 2011 WL 6960810 (E.E.O.C.) (discrimination based on sex-stereotype that women should only have sexual relationships with men can constitute discrimination based on sex)



# Title VII Claims by Lesbian, Gay, and Bisexual Federal Employees Cont.

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- **For federal agencies, this means that:**

EEO Counselors should assist individuals in clearly defining their claims.

Lesbian, gay and bisexual employees who believe they have been discriminated against because of their **sexual orientation** should be **counseled** that they have **a right to file a complaint under the 1614 process**, because they may have experienced **sex discrimination** under Title VII.



# Appeals to the Commission

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- If a lesbian, gay, or bisexual employee files a complaint under the 1614 process and the agency rejects the complaint as failing to state a claim of sex discrimination, **the agency should ensure that it provides the employee with the appropriate notice of right to appeal** as set forth in EEOC's regulations (29 CFR 1614.401) and MD 110.



# Other Federal Processes for Addressing LGBT Discrimination – EO 13087

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- Executive Order 13087 explicitly prohibits discrimination based on sexual orientation.
- Federal agencies should retain procedures that permit employees to file complaints of sexual orientation discrimination under the Executive Order.
- Where a lesbian, gay, or bisexual employee files a complaint under the 1614 process for sex discrimination, the complaint may be dual filed under both the 1614 and EO processes.
- But the complaint can be filed just under the 1614 process, if that's what the person wants.



# Other Federal Processes for Addressing LGBT Discrimination – Office of Special Counsel

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- Employees may also file complaints of sexual orientation and gender identity discrimination with the Office of Special Counsel (OSC).
- OSC has taken the position that allegations of discrimination based on sexual orientation and gender identity may constitute prohibited personnel actions under Title V of the Civil Service Act and therefore will accept and investigate complaints of sexual orientation and gender identity discrimination filed by federal employees.
- More information about how to file a prohibited personnel practice complaint with OSC can be found at: <http://www.osc.gov/ppp.htm>



# For Practical Guidance

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- Google OPM and Transgender Guidance – and you will get OPM's nice guidance on dealing with practical issues.
- This is not LEGAL advice from the EEOC. That will have to come from the EEOC in cases or guidance.





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# **Let's Talk ADA: Reasonable Accommodation Edition**



# Introduction

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- The one thing you need to know about the impact of the ADAAA on coverage under §501 of the Rehab Act is:
  - It is now easier to establish coverage as a person with a disability . . . meaning that . . .
  - We' ll be spending less time on the question of coverage and more time on questions of reasonable accommodation.
  - Some of the toughest questions will arise regarding leave, modified work schedules, telecommuting, and reassignment as Reasonable Accommodations.



# Coverage is easier to establish under prongs 1 and 2 because . . .

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- \* Major life activities include major bodily functions
- \* Broad construction of “substantially limits”
- \* Ameliorative effects of mitigating measures NOT considered
- \* Impairments that are “episodic” or “in remission” are substantially limiting if they would be when ACTIVE.
- \* Impairment that is temporary – one that will last fewer than six months – can be substantially limiting

See 29 C.F.R. §1630.2(j)(3)(iii) for a list of impairments that will generally be covered under the new definitions and rules of construction.



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# How to Prepare for a Reasonable Accommodation Request Before One is Made



# Job Descriptions

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- Preparing job descriptions is one of the best ways to get ready for a reasonable accommodation request
- A good job description will contain:
  - Statement of the job type;
  - List of essential and non-essential functions;
  - List of production standards required; and
  - The necessary qualification standards for the job type.
- Job type refers to the focus area of the position in question, for ex. Sales Manager, Administrative Assistant, Attorney-Advisor, etc.



# Job Functions

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- Job Functions refer to the tasks or duties that an employer expects to be performed/completed by an individual in a given job type.
- When listing functions, the employer should concentrate on what needs to happen as opposed to how it usually happens.
  - Ex: a delivery person needs to load and offload parcels; she does not necessarily need to “lift” parcels (note: this may not be the only essential function).
  - Ex: a manuscript reviewer needs to review 20 manuscripts in a work-week; not necessarily 20 manuscripts between 9 am and 5 pm, Monday through Friday.



# Essential Functions

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- In delineating job functions, break down the functions into essential and non-essential functions.
  - Essential functions – the tasks necessary for the job to be completed
  - Non-essential functions - all other tasks associated with the job
- For many employers, all job functions may seem essential, particularly if the functions have always been part of a job.
- But §501 of the Rehab Act is a “**stop, think, and justify**” law. Figuring out the essential and non-essential functions is the first step.
- The reasoned judgment of the employer is key.



# Attendance is not Technically an Essential Job Function

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- An employer never has to remove an essential job function.
- Attendance is not technically an essential job function because it is a function that is **removed** if an employer grants leave or a reduced hour schedule as a reasonable accommodation.
- But attendance is **important** to almost any job. So it will often be an **undue hardship** if the person is unable to show up at a job in a **reliable, consistent manner**.





# Examples of Essential and Non-Essential Functions

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## **Position:**

Administrative Assistant

## **Essential functions:**

Manage calendar for supervisor

Make travel arrangements for supervisor

Submit reimbursement requests for supervisor through a computer system

Answer supervisor's phone and relay messages

Arrange small-events and meetings

Meet visitors and escort them to supervisor's office

Order supplies for office

## **Non-essential functions:**

Keep refrigerator stocked with water and soda.



# Production Standards

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- Production Standards refer to the **quantitative** or **qualitative** performance standards that an employer believes an employee must meet in order to accomplish a job.
  - A quantitative production standard measures how *much* an employee produces or accomplishes (i.e. a monthly sales quota)
  - A qualitative production standard measures how *well* an employee does his or her job (i.e. a company requires that a customer service representative provide “quality” service as defined by the company).



# Production Standards (Cont.)

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- A qualified individual with a disability is a person with a disability who can, **with a reasonable accommodation if necessary**, perform the essential functions of the job **up to the production standards** of the employer.
- Because production standards must be applied **uniformly**, job descriptions should clearly state the employer's expectations for the job and such expectations should be applied **consistently in practice**.
- An employer will be required to provide a reasonable accommodation that does not impose an undue hardship in order for the employee **to meet the production standards**.



# Production Standards (Cont.)

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- While production standards do not need to be lowered, production standards may need to be **prorated** if an employee required **leave** or a **reduced hours schedule** as a reasonable accommodation.

Example: A salesperson takes five months of leave as a reasonable accommodation. As a result, the salesperson falls short of the required yearly sales quota. In evaluating the salesperson's performance, the employer should prorate the yearly sales figure to account for the fact that the salesperson missed five months of work.



# Qualification Standards

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- **Qualification standards** are the standards the employee needs to meet in order to perform the essential job functions up to the employer's production standards. These qualification standards can include:
  - 1) **Physical requirements** (e.g. vision, hearing, walking, or lifting requirements);
  - 2) **License requirements and eligibility prerequisites** (e.g. law license, drivers license);
  - 3) **General capacity requirements** (e.g. "the ability to manage many small details").



# Qualification Standards

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- Definition of disability for purposes of a qualification standards is any physical or mental impairment (that is not both transitory and minor).
- Even if a qualification standard is “job-related and consistent with business necessity,” the employer will need to provide a reasonable accommodation to enable a person with a disability to meet the qualification standard -- unless providing the accommodation would impose an undue hardship.
- Definition of disability for purposes of providing a reasonable accommodation is a physical or mental impairment that substantially limits a major life activity.



# Putting it all Together

A sample job description might look like:

**Position:**

Administrative Assistant

**Essential functions:**

Manage calendar for supervisor; Make travel arrangements for supervisor; Submit reimbursement requests for supervisor through a computer system; Answer supervisor's phone and relay messages; Arrange small-events and meetings; Meet visitors and escort them to supervisor's office.

**Marginal functions:**

Keep refrigerator stocked with water and soda.

**Qualifications/Skills:**

Bachelor's degree; knowledge of Microsoft programs such as Outlook and Word; the ability to manage small details.

**Production Standards:**

Respond to all travel requests within one week of receipt;  
Submit reimbursement requests within one week of receipt;  
Keep calendar updated on a daily basis.



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# Someone Shows Up – Responding to a Reasonable Accommodation Request





# The Reasonable Accommodation Interactive Process

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- A request for reasonable accommodation is the **first step** in an **informal, interactive process** between the individual and the employer.
- The ultimate goal of the interactive process is to find an accommodation that will allow the individual with a disability to perform the essential functions of the job up to the production standards of the employer or to enable an individual to meet a qualification standard.
- Note: the interactive process should be informal -- not legalistic.



# Examples

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Example 1: An administrative assistant with ADHD requests that he no longer be responsible for managing his supervisor's schedule as he is unable to concentrate sufficiently in his office environment to perform that task.

Example 2: An administrative assistant with fibromyalgia asks to work an 11 am to 7 pm schedule rather than 9 am to 5 pm.



# Road Map for the Conversation

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1. Is this a plausible request in light of the type of job?
2. Would this request impose an undue hardship?



# More Examples

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Example 3: An administrative assistant who sustains severe injuries in a car accident and is using a wheelchair for several weeks requests that responsibility for keeping the refrigerator stocked be transferred to another employee.

Example 4: An administrative assistant who lost her right hand as a result of a combat injury sustained during military service requests the use of a modified keyboard as an accommodation in order to submit the reimbursement requests through the computer system.



# More Examples

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Example 5: An administrative assistant requests leave to adjust to new medication for her bipolar disorder. She indicates that her doctor believes she will need two weeks. The administrative assistant has been on the job for six months.

Example 5a: Shortly before the two weeks are up, the administrative assistant requests an additional two weeks.

Example 5b: At the conclusion of those two weeks, the administrative assistant requests to telework for two weeks.



# Some Legal Rules

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1. An employer is not required to provide a reasonable accommodation if doing so would impose an **undue hardship** on the employer.
2. The definition of undue hardship is “significant difficulty or expense.”
3. An employer can show that an accommodation imposes either significant financial difficulty or significant operational difficulty.
4. The undue hardship analysis is completely case specific.



# No-Fault Attendance and Maximum Leave Policies

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- An employer can have an attendance policy and maximum leave policy.
- But, an employer must provide, as a reasonable accommodation, a modification to those policies if doing so would not impose an undue hardship.



# Some Final Thoughts: Plain English Works

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- To request accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation."

Example 1: An employee's spouse phones the employee's supervisor on Monday morning to inform her that the employee had a medical emergency due to diabetes, needed to be hospitalized, and thus requires a few days off to recover. This is a request for short-term leave as an accommodation on behalf of the employee.





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- Example 2: An employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of side effects from one of my medications. Can we work something out?" This is a request for a modified work schedule as an accommodation.
  - Example 3: An employee tells his supervisor, "I need six weeks off to get treatment for cancer." This is a request for long-term leave as a reasonable accommodation.



# Some Final Thoughts: Coming Forward!

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- It is the interests of the employee to come forward and inform the employer about the employee's disability.
- It is also in the interests of the employer to let employees know that they can and should come forward.

Example: An employee with a disability experiences performance problems related to his disability. The employee is written up for poor performance on three separate occasions. When the employee fails to show improvement after the write-ups, the employer decides to terminate the employee. At the termination interview, the employee brings up the fact that he has a disability. The employer may proceed with the termination.



# For the full low down . . .

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- Download RA Guidance and Macy v. Dep't of Justice Decision at [www.eeoc.gov](http://www.eeoc.gov)
- Follow Commissioner Feldblum @chaifeldblum.
- Follow the EEOC @EEOCNews

AND to give me your low-down:

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